

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



578

NO. 22,728

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SYLVESTER L. CARTER

Defendant-Appellant

---

On Appeal From the Judgment of The  
United States District Court for the District of Columbia

---

BRIEF FOR THE DEFENDANT-APPELLANT

+

---

United States Court of Appeals  
for the District of Columbia Circuit

FILED AUG 19 1969

*Nat. F. Paulson*  
CLERK

JAMES R. SCULLEN  
Attorney for Defendant-Appellant  
Appointed by this Court  
648 Warner Building  
Washington, D.C. 20004

No. 22,728

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

SYLVESTER L. CARTER

Defendant-Appellant

---

On Appeal From The Judgment Of The  
United States District Court for the District of Columbia

---

BRIEF FOR DEFENDANT-APPELLANT

---

JAMES R. SCULLEN  
Attorney for Defendant-Appellant  
Appointed by this Court  
648 Warner Building  
Washington, D.C. 20004

---

# TABLE OF CONTENTS

	Page
Statement of Issues Presented for Review.....	3
Reference to Rulings.....	4
Statement of the Case.....	4
Statement of Facts.....	5
Argument:	
1. Did the Court err when it instructed the Jury that one of the Co-Complainants, Sheila Marie Evans, 15 years of age, was legally incapable of consenting to an Assault With Intent To Commit Carnal Knowledge .....	8
2. Did the Court err when it failed, sua sponte, to instruct the jury on the lesser included offenses where defendant was prosecuted under Titles 22-2801, 22-501, 22-3502, D.C. Code.....	13
Conclusion.....	18

## CITATIONS

### Cases:

<u>Allison v. United States</u> , _____ U.S. App. D.C. _____ 409 F2d 445 (1969).....	14, 17, 18
* <u>Austin v. United States</u> , 127 U.S. App. D.C. 180, 382 F2d 129 (1967).....	17
* <u>Bollenbach v. United States</u> , 326 U.S. 607 (1945).....	13
<u>Bush v. United States</u> , 215 A2d 853 (1966), D.C. Court of Appeals.....	15
<u>Coltrane v. United States</u> , _____ U.S. App. D.C. _____ F2d _____ (1969) No. 21,843, Decided May 23, 1969.....	9
<u>Dozier v. United States</u> , 127 U.S. App. D.C. 266; 382 F2d 482 (19 ).....	16

CITATIONS

Cases:	Page
<u>Hall v. United States</u> , 84 U.S. App. D.C. 209; 171 F2d 347 (1948).....	12
<u>Miller v. United States</u> , 93 U.S. App. D.C. 76; 207 F2d 33 (1953).....	14
* <u>Sanselo v. United States</u> , 44 App. D.C. 508 (1916) 8, 9, 10, 11, 13	
* <u>Thompson v. United States</u> , 97 U.S. App. D.C. 116; 228 F2d 463 (1955).....	12, 14, 15
<u>United States v. Brown</u> , D.C. D.C. Criminal No. 1040-55.....	12
* <u>United States v. Gainey</u> , 380 U.S. 63 (1965)....	13
* <u>Younger v. United States</u> , 105 U.S. App. D.C. 52; 263 F2d 735 (1959).....	14, 15
* Cases or authorities chiefly relied upon are marked by asterisks.	

Statutes:

D.C. Code 1967:

Title 22-501.....	4, 8, 9, 10, 14, 15, 16, 18
Title 22-504.....	4, 8, 9, 10, 14, 15 16, 18
Title 22-2801.....	4, 8, 9, 10, 14, 15 16, 18
Title 22-3501(a).....	4, 8, 9, 10, 14, 15 16, 18
Title 22-3502.....	4, 8, 9, 10, 14, 15 16, 18

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court err when it instructed the jury that one of the co-complainants, Sheila Marie Evans, 15 years of age, was legally incapable of consenting to an assault with intent to commit carnal knowledge.

2. Did the Court err when it failed, sua sponte, to instruct the jury on the lesser included offenses where defendant was prosecuted under Titles 22-2801, 22-501, 22-3502, D.C. Code 1967.

This case has not been before this Court previously.

REFERENCE TO RULINGS

None by Court below, other than denial of bail pending appeal.

STATEMENT OF THE CASE

Defendant Sylvester Carter, age 19 years at the time of his alleged offense, September 19, 1967, was arrested pursuant to a complaint made by one Carolyn Yvonne Cunningham, age 16 years and Sheila Marie Evans, age 15 years.

Indicted on the 22nd day of November, 1967 for the crimes of Rape and Carnal Knowledge under Title 22-2801, D.C. Code, Assault with Intent to Commit Carnal Knowledge under Title 22-501; and Sodomy under Title 22-3502, defendant was tried before a jury on December 3, 1968 and acquitted on Counts 1, 2 and 4 and found guilty on Count 3 which described the offense of Assault with Intent to Commit Carnal Knowledge of one Sheila Marie Evans.

Defendant remained incarcerated from September 19, 1967 until January 26, 1968 when he obtained release on \$1,000 bond.

Upon conviction a sentence was imposed on January 17, 1969 under the Youth Corrections Act.

A motion for release on bail pending appeal was filed in the United States District Court for the District of Columbia on March 18, 1969, and before this Court on the 8th day of April, 1969. Both motions were denied. The defendant remains incarcerated under his sentence.

STATEMENT OF FACTS

On September 17, 1967 about 7:30 P.M. Carolyn Cunningham, then 16 years of age, in company with a long time friend, Sheila Marie Evans, then age 15 years of age, visited 14th and Park Road, N.W. area of Washington, D.C. They were looking for a dance in the recreation part of Rayford School on Spring Road, N.W., Washington, D.C. R. p. 58.

They picked up four boys on the street. R. p. 61. The defendant was not among this group. R. pp. 64, 66.

The girls went to the basement portion of a house with the boys where they danced and partied in a loud manner R. pp. 69, 70.

Later they engaged in sexual acts with a crowd of boys around, allegedly by force. R. pp. 74, 75.

The defendant was not present or involved at this place.

The girls dressed and walked willingly to a playground with the boys holding hands. R. p. 84.

At the playground they had sexual relations again apparently with several of the same boys and some others. R. p. 89.

The defendant arrived at the playground while these sexual acts were in progress, but did not engage in any of the sex activities at that location. R. p. 90.

The girls accompanied, by this time, by "quite a few boys" went to defendant's house. R. p. 93. In the basement of the house

a tall boy named "Slim" ordered Sheila to take her clothes off and she took them off and laid down on a mattress. R. p. 104.

Carolyn Cunningham, apparently at someone else's command, also took her clothes off, and she laid down on a mattress. R. p. 104.

Neither prosecutrix suggested the defendant gave any of the orders.

Sheila testified defendant tried to have intercourse with her twice but was sexually ineffectual and he yielded his place to a boy who commanded him to move out of the way R. p. 106. She also testified that defendant and another boy put their penis' in her mouth. R. p. 107. The jury did not believe this statement and defendant was acquitted of this charge. Co-prosecutrix Carolyn Cunningham testified that defendant had removed Sheila's clothes but this was contradicted by Sheila herself. R. pp. 104, 211.  
(Carolyn)  
This was understandable because she also testified that five of the boys held her legs, two held her arms and some more boys cut the lights out. R. p. 195. At R. p. 198 she stated flatly she had intercourse with twelve boys. R. p. 198.

The defendant was not involved in any of these acts with her. R. p. 261. And the only event she observed was the one time he tried to "get on Sheila". R. p. 260.

Defendant testified that the girls came to his house willingly. That he was not aroused by the events. That he did

not have much control of the boys, the girls or the events, and that the girls appeared not to object. R. pp. 390 to 399.

The girls complained to police officer Thompson about 1 A.M. at 9th and Upshur Street, N.W., Washington, D.C.

Each of the places where the girls had sexual relations were visited and defendant's basement was the last place identified by them. R. p. 301.

Defendant was invited by Officer Baker to appear at headquarters at 1 P.M. on September 19, 1967 two days later and he did so.

Officer Baker said defendant was not under arrest at that time. R. p. 307.

Defendant was later indicted and tried for the offenses.

Only the conviction and judgment under Count 3 remains.

This appeal followed.

ARGUMENT

DID THE COURT ERR WHEN IT INSTRUCTED THE JURY THAT ONE OF THE CO-COMPLAINANTS, SHEILA MARIE EVANS, 15 YEARS OF AGE, WAS LEGALLY INCAPABLE OF CONSENTING TO AN ASSAULT WITH INTENT TO COMMIT CARNAL KNOWLEDGE

The legal truism of this case is that the defendant had little or no hope of obtaining acquittal on all four counts of the indictment.

This is so irrespective of the desire of the jury to exonerate him completely. It is also true when one examines the record in an attempt to discern, with particularity, how the jury reached a "Not Guilty" verdict on Counts 1, 2 and 4 but convicted the defendant on Count 3.

The apparent genesis of the jury action lies in the clarifying instruction given by the trial court at R. pp. 629 through 631, after the jury requested additional instruction on attempted rape and carnal knowledge.

However, the real source of the conviction springs from the anachronistic doctrine of Sanselo v. United States, 44 U.S. App. D.C. 508 (1916) compounded by a maze of sex cases decided by this Court construing Titles 22-2801; 22-501; 22-3501(a) and 22-504 as they interrelate.

Defendant urges, in the light of legal reason, which hopefully has advanced since Sanselo, that the doctrine of

"conclusive presumption" first announced there be reexamined. Moreover, defendant respectfully requests this Court to view the anomalous results which emanates from the decided cases since 1916.

Recently this Court in Coltrane v. United States decided May 23, 1969, No. 21,843 traced the history of many "sex" cases in this jurisdiction, with emphasis on corroboration, and the perplexing problems which emerge from a balancing of individual rights vis-a-vis the right of society to protect sex victims and itself.

The basis for the decision in Sanselo, applicable perhaps in that era, when a sixteen year old female was less sexually precocious than her modern counterpart, is tenuous indeed. Although the statute then, and its amendment today, does not contain an express presumption, much less an irrebuttable or conclusive one, this Court decided that the mere mention of age at 16 years, voided that child of legal capacity to consent to sexual acts.

By this single legal device force, and with it, the crime of assault, were presumed. It mattered not, in the wisdom of the law, that actually neither force nor assault were present in a given case. And it also did not matter whether, as here, the (child) in question wore sex symbols on her back (69) R. p. 438 which the government conceded R. p. 439. No doubt many hapless

defendants were successfully prosecuted and imprisoned on the strength of this dubious approach over the ensuing years.

Most, if not all, statutory presumptions are rebuttable I Whorton Criminal Evidence 176 par. 91.

The durability of the judicial presumption, attested to by Sanselo's long life and application, seems to impart greater vitality to a presumption created by stare decisis through the judicial process rather than the legislative fiat.

This specious argument should fall. The efficacy of criminal presumptions should be equal not disparate. A reexamination of legislative history of all the sex statutes mentioned above reveals a close study by the Congress of the effect on the enforcement of each act yet their intent was not to create conflicting substantive and procedural rules of evidence.

The rule in the landmark case, Sanselo, allegedly rests on legislative intent which was, at best, implied. Had the legislative body not amended the provisions of the sex statutes, since that time, some strength to the construction given by this Court might remain, but, having had several opportunities to enact express presumptions and having failed to do so, except to 3501(a) this Court can construe this omission as a deliberate act in order to preserve and balance the presumption of innocence that ostensibly surrounds a defendant until it is eroded by countervailing evidence which convinces a jury beyond a reasonable doubt.

The doctrine in Sanselo can be rectified without this Court's intrusion into the legislative field. It is apparent this Court construed or read into the original act a conclusive presumption where none appears.

If there had been, in this case, a rebuttable presumption, as there was for the co-prosecutrix, Carolyn Cunningham, only

16 years of age, it is virtually certain the defendant would have been acquitted. This conclusion is inherent in the wording of the question propounded by the jury to the Court. R. p. 629.

What does a study of the legislative history show with respect to the "intent to create a conclusive presumption"?

In S.R. 122 Vol. 34, 56th Cong. and H. Reports Vol. 4212, 57th Cong., 1901, it is clear that the Congress adopted the arbitrary age of 16 years to define a minor within the meaning of the act. No discussion can be found concerning presumptions, conclusive or rebuttable. It was the judicial characterization that forged the iron clad rule which still prevails. But reason and due process requires criminal statutes to be construed in a non-arbitrary and fair manner.

What was intended by the Congress in the amended sex act is also clear. Where the child is of tender years and lacks legal capacity in fact a conclusive presumption may well arise. Thus a preliminary inquiry by the trial judge contemplated by

Rule 1 - 04 of the proposed rules of evidence would quickly determine the actual capacity of the child and also determine the character of the presumption to be given to the jury under careful balancing instructions.

Where the child reaches the age where physical and mental capacity to consent are manifest, as in this case, then such presumption would be rebuttable and the jury would be so instructed.

Thus the application of the conclusive presumption of force and lack of capacity to consent found in Hall v. United States, 84 U.S. App. D.C. 209; 171 F2d 348 (1948) involving an eight year old child would be justified and the same result would probably follow where the mental capacity of the child was impaired as noted by this Court in Thompson v. United States, 97 U.S. App. D.C. 116; 228 F2d 463, 464 (1955) where a 13 year old deaf mute child was involved.

However a contrary result can be reached by juries where the presumption is not emphasized and is not presented to them in a fashion tantamount to a direction to find the presumed fact against the accused. 9 Wigmore 1495 p. 312, advisory's committee Notes proposed Rules of Evidence at p. 37.

Illustrative of one such case United States v. Brown, Criminal No. 1040-55 decided on the      day of      , 1955 where the defendant was acquitted by a jury of carnal knowledge of a 12 year old child, six months pregnant, who admitted on gentle

cross examination that she had intercourse with other men previously.

The reiteration of the Sanselo doctrine is convenient but it is also sterile, lacking in reason, and often directly opposed to the actual facts.

The use of conflicting presumptions against an accused are fraught with peril unless the safeguards now suggested by Rule 3 - 01 proposed Rules of Evidence are invoked.

Had the defendant the benefit of the teaching of United States v. Gainey, 380 U.S. 63 (1965) and Bollenback v. United States, 326 U.S. 607 (1945), when the clarifying instructions was given, that is, while the lack of consent of a child under sixteen years is presumed in law, such a presumption did not conclude the jury from acquitting the defendant on a violation of 22-501, the result might well have been different.

Of course, the court acted upon the basis of Sanselo and its progeny but defendant respectfully asserts due process requires that doctrine be reexamined otherwise Gainey and the proposed rules of evidence seen in hopeless conflict with actual practice.

## II

DID THE COURT ERR WHEN IT FAILED,  
SUA SPONTE, TO INSTRUCT THE JURY  
ON THE LESSER INCLUDED OFFENSES  
WHERE DEFENDANT WAS PROSECUTED  
UNDER TITLES 22-2801, 22-501, 22-3502

While the doctrine of lesser included offenses seems logical

and is deeply embedded in our case law, its attenuation in the field of sex laws can hardly be gainsayed.

A brief analysis of how willing this Court has been to invoke the doctrine will serve to illustrate why a converse application of the lesser offense instruction rule is required.

The four statutes which co-relate are Title 22-2801, 22-501, 22-3501, 22-504, D.C. Code 1967.

In Miller v. United States, 93 U.S. App. D.C. 76; 207 F2d 33 (1953), this Court said "the crime of carnal knowledge includes the crime of assault with intent to commit carnal knowledge. This is not a legal fiction. It is a fact that the law recognizes". Later in Thompson v. United States, 97 U.S. App. D.C. 116; 228 F2d 463 (1955) despite an express provision by the legislature that Title 22-3501 shall not apply to the provisions of Title 22-2801, this Court held that, by implication, the statutes were related and has since, in a number of cases, described the Miller Act as a lesser included offense. Younger v. United States, 105 U.S. App. D.C. 52; 263 F2d 735 (1959); Allison v. United States, No. 21,862, infra.

In Younger, the court then said the Miller Act 22-3501(a) and Title 22-501 were also related and 3501(a) was a lesser included offense, not only of Title 22-2801 but also a lesser included offense of Title 22-501.

Again, no express legislative provisions exists for the correlation but the court was able to relate the statutes. Finally in Bush v. United States, 215 A2d 853 (1966) the defendant was convicted, on information, of the crimes of Title 22-2801 the lesser included offense, ostensibly punishable by one year or less; and simple assault and threats. Title 22-504, D.C. Code. Also in Younger appellant raised, unsuccessfully, the desirability to have an instruction on the lesser included offense of simple assault. It seems fair to say that the status of the law is:

1. That the government can expect to prosecute Title 22-2801 and, if failure of proof on rape or carnal knowledge is met during the trial, the court can, with approval of this Court, instruct on the lesser included offense, even though it is an independent criminal statute with different elements and punishment and defendant was not indicted under 501.
2. The government may bring an action, as here, on 2801 and 501 and by virtue of Thompson and Younger expect upon failure of proof on either statute during the trial to have an instruction on 3501(a) or at least 504.
3. The government may bring an action on 501 and upon failure of proof expect to receive an instruction on 3501(a) and 504.

4. Or the government may, as it elected to do in Bush, perhaps where the evidence is weak and faced with an ignoramus before the grand jury, try 2801 as a misdemeanor.

With such a panoply of legal armament it is doubtful that even "traditional skepticism of the courts" will suffice to protect defendants accused of sex offenses. Appellant, aware of the natural repugnance that emerges from sex accusations against young children, respectfully requests this Court to determine whether in the interest of simple justice, when there is a trial under 2801 and 501, D.C. Code, that trial court instruct, *sua sponte*, on all the lesser included offenses.

This procedure is followed in other capital offenses and, in this case particularly, would have placed the case in proper perspective for the jury.

This case is easily distinguished from Dozier v. United States, 127 U.S. App. D.C. 266; 382 F2d 482/where the Court asserted there was no error in failing to instruct on simple assault for in that case the simple assault instruction was given under 501. A fortiori no such instruction here was given under 2801 or 501 despite the fact the circumstances of this case, including the corroboration of the *corpus delicti* and the elements of the crime specified under a violation of Title 22-501 was so close. See

Allison v. United States, U.S. App. D.C. ; 409 F2d 445  
(1969) at p. 6.

Moreover if the Court is reluctant to require the instruction on all lesser included offenses for 2801, 501 and 3501(a) then appellant respectfully requests the application of the doctrine approved by this Court in Austin v. United States, 127 U.S. App. D.C. 180; 382 F2d 129 (1967) where the construction of 27 U.S.C. 2106 (1964) authorizes federal appellate courts to modify a criminal judgment to that of a lesser included offense.

This case meets the criteria set forth in Allison v. United States, supra.

The corroborative evidence fails to support an attempt to commit carnal knowledge. The vital corroborative evidence offered by co-complainant Cunningham was contrary to the testimony of Miss Evans, on the subject of who removed the clothes of Sheila Evans, R. p. 211 while Sheila testified she removed them herself R. p. 104 at the request or demand of "Slim" - not the defendant and the corroboration fails completely when at R. p. 216 the witness who might have corroborated an intent stated she was not watching the events because "she did not want to see" R. p. 217. There is no doubt witness Cunningham could relate what others might have done but she was only able to say that "Cig" was on Sheila for a time. But the complainant Sheila indicated defendant was



unable to perform the act. See Allison at p. 6 where this fell short of the requisite proof necessary under 22-501 (1967) D.C. Code.

Secondly the evidence, if believed, would support the elements of either a violation of 3501(a) or 504, Simple Assault.

Thirdly - both are by definition and case law lesser included offenses of Title 22-501 D.C. Code.

Fourth - the defendant would not be prejudiced since a lesser sentence might, in the light of his time, already served, be sufficient to satisfy the requirements of justice, especially under the circumstances of this particular case. Emphasis added.

#### CONCLUSION

Defendant-Appellant respectfully requests this Court to reverse the judgment entered below under Title 22-501, D.C. Code or, in the alternative, direct the entry of a judgment under a lesser included offense described in Title 22-3501(a) or 22-504 with direction to credit the defendant-appellant with time already served.

Respectfully submitted,

JAMES R. SCULLEN  
Attorney for Defendant-Appellant  
Appointed by this Court  
648 Warner Building  
Washington, D.C. 20004